Sutera Harbour Golf & Country Club Bhd v Omega Brilliance Sdn Bhd & Anor

HIGH COURT (KOTA KINABALU) — SUIT NO BKI-22NCvC-21/2 OF 2016 (HC1)
BEXTER AGAS MICHAEL JC
7 MAY 2018

Land Law — Interest in land — Claim for — Dispute over ownership and right to possession of land — Whether there was common expectation or assurance — Whether tenancy agreement negated common expectation — Whether defendants established elements of proprietary estoppel — Whether ss 131 and 132E of the Companies Act 1965 applied — Whether defendants had right to occupy, use and own land

The plaintiff was the registered proprietor of a parcel of land held under Town Lease No 017544875 measuring more or less 95.58 hectares or 238.63 acres and situated in Sembulan, District of Kota Kinabalu, Sabah ('the land'). The second defendant was a director and shareholder of both the plaintiff and the first defendant. Profound Heritage Sdn Bhd ('PH') was granted a license under the Electricity Supply Act 1990 to generate electricity for sale and distribution to consumers within Sutera Harbour Resort. The plaintiff was one of such consumers for the supply of electricity and a tenancy agreement dated 1 December 2012 was entered into between PH being the tenant and the plaintiff being the landlord over a specific portion of the land measuring approximately 1.459 acres ('the subject land') on which PH was to and did erect a building and sub-stations for the supply of electricity. PH was wound up by court on or about 11 January 2012. Pursuant to the assets sale agreement dated 12 July 2013 ('assets SPA'), PH sold the plant and machinery located on the subject land to the first defendant. By a sale and purchase agreement dated 1 March 2014, the subject land was allegedly sold by the plaintiff to the first defendant for the purchase consideration of RM1,000 ('SPA'). In March 2014, changes took place in the shareholding of the plaintiff which arose from the agreement dated 30 December 2013 entered into between, inter alia, the second defendant, the plaintiff's ultimate holding company and new investors ('the subscription agreement'). The subscription agreement was completed on 26 March 2014 and under its terms, any sale and disposal of the plaintiff's assets outside the ordinary course of business was prohibited between 30 December 2013 to such time the subscription agreement was completed. The first defendant presently occupied the subject land and operating the co-generation facility. The plaintiff claimed against the defendants for, inter

alia, a declaration that the purported sale and purchase agreement allegedly dated 1 March 2014 entered into between the plaintiff and the first defendant in respect of a certain portion of the plaintiff's land was null and void and/or voidable and had no legal effect; a declaration that the second defendant had breached his fiduciary duty owed to the plaintiff; an order for vacant possession of the subject land; damages, further; and/or alternatively, rental and double rental at a specified rate until possession of the subject land was delivered up by the first defendant to the plaintiff. The defendants counterclaimed against the plaintiff for, inter alia, a declaration that the plaintiff was estopped from denying the proprietary interest of the first defendant in the subject land pending issuance of subdivided title following approved subdivision of land held under the surrendered document of title TL 017544875; a declaration that the first defendant's proprietary right and interest in the subject land was that of an owner-leaseholder pursuant to the terms and conditions of the lease offered by the State Government of Sabah and contained in the pending subdivided document of title to the subject land; an order that the plaintiff be directed to transfer the whole interest in the subject land to the first defendant within 90 days from the date of issuance of the thence subdivided issued document of title together with delivery up of the issued document of title with the first defendant registered as the leaseholder of all the interest in the subject land free from all encumbrances. The issues for consideration were: (a) whether there was common expectation or assurance; (b) whether ss 131 and 132E of the Companies Act 1965 ('the CA') applied; and (c) whether the tenancy agreement, etc negated the common expectation.

Held, dismissing the plaintiff's claim and allowing the defendants' counterclaim with costs of RM50,000:

(1) Since the historical documents did in fact verify or corroborate what the second defendant said on the development of the resort, and in particular the subject land, this amounted to an admission of the second defendant's evidence on the development from 1997 until the plaintiff, under the new management, failed to honour the common expectation or assurance. There was nothing amiss in recognising and stating that the plaintiff was the registered title owner. It did not in any way negate the existence of the common expectation or assurance. It was in the manner that the plaintiff insisted on its rights as registered title owner that being estopped in relation to the first defendant's occupation and use of the subject land. Whilst PH was in no position to sell the subject land, it was the co-generation facility and all other assets on the subject land and the right to own and operate it that was transferred to the first defendant from PH. With the transfer, the first defendant became the successor to all the rights of PH including the right to the proprietary estoppel since

it had taken PH's place in possession of the assets and the subject land (see paras 35 & 37–38).

(2) The plaintiff, under its new management, could not apply the provisions of ss 131 and 132E of the CA. It was because, firstly, PH and the first defendant already possessed the right in the subject land prior to and independent of the SPA. The SPA was a mere formality to convey the interest which was intended all along to go to the developer in what was initially a Sabah Electricity Sdn Bhd Reserve but had evolved to become a land reserved for the development of a co-generation facility. Secondly, the common expectation or assurance in which the plaintiff had acquiesced in or encouraged reliance by PH and later the first defendant constituted informed consent and authorisation of the substance of the transaction on the plaintiff's part. Thirdly, the first defendant's right and equity predated the SPA and was distinct and independent of it. The first defendant was neither defending the SPA nor seeking specific performance of the SPA. Finally, the plaintiff failed to appreciate that the defendants were not invoking the aid of equity to say that the SPA had given an interest in the subject land to the first defendant and the defendants were invoking the aid of equity to protect that interest under the SPA. The common expectation and assurance occurred long before, since 1997 (see paras 40–42 & 47).

(3) From the time of development of the co-generation facilities until completion in 1999 and from 1999 until 1 December 2002 when the one year tenancy agreement was entered, PH had occupied and operated the subject land without any written agreement of any sort. This in itself was further evidence of the common expectation or assurance between the plaintiff and PH. The subscription agreement, to which the first defendant was not a party, did not in any way determine whether the first defendant had the right to remain on the subject land. It neither affirmed nor negated the common expectation between PH and the plaintiff which occurred very much earlier, since 1997. There was no merit in the plaintiff's submission that the correspondence negated the common expectation, because the correspondence referred to was between the Department of Lands and Surveys and the plaintiff to resolve the problems encountered between the land authority and the landowner in the subdivision exercise (see paras 49, 53 & 62).

(4) The defendants had succeeded on a balance of probabilities in establishing the existence of common expectation or assurance between PH and the plaintiff and the elements necessary to invoke the equitable principle of proprietary estoppel against the plaintiff (see para 65).

[Bahasa Malaysia summary

Plaintif adalah pemilik berdaftar sebidang tanah yang dipegang di bawah Pajakan Bandar No 017544875 berukuran lebih kurang 95.58 hektar atau 238.63 ekar dan terletak di Sembulan, Daerah Kota Kinabalu, Sabah ('tanah'). Terdakwa kedua adalah seorang pengarah dan pemegang saham kedua-dua plaintif dan defendan pertama. Profound Heritage Sdn Bhd ('PH') telah diberikan lesen di bawah Akta Bekalan Elektrik 1990 untuk menjana elektrik untuk jualan dan pengedaran kepada pengguna di Sutera Harbour Resort. Plaintif adalah salah satu daripada pengguna tersebut untuk bekalan elektrik dan perjanjian penyewaan bertarikh 1 Disember 2012 telah ditandatangani antara PH sebagai penyewa dan plaintif sebagai tuan tanah di atas sebahagian tertentu tanah yang berukuran kira-kira 1.459 ekar ('tanah subjek') yang mana PH telah dan mendirikan bangunan dan sub-stesen untuk bekalan elektrik. PH telah digulung oleh mahkamah pada atau sekitar 11 Januari 2012. Menurut perjanjian penjualan aset bertarikh 12 Julai 2013 ('SPA Aset'), PH menjual loji dan jentera yang terletak di tanah subjek kepada defendan pertama. Dengan perjanjian jual beli bertarikh 1 Mac 2014, tanah subjek itu didakwa dijual oleh plaintif kepada defendan pertama untuk pertimbangan pembelian sebanyak RM1,000 ('SPA'). Pada Mac 2014, perubahan berlaku dalam pemilikan saham plaintif yang timbul daripada perjanjian bertarikh 30 Disember 2013 yang ditandatangani antara, defendan kedua, syarikat pegangan utama dan pelabur baru ('perjanjian langganan'). Perjanjian langganan diselesaikan pada 26 Mac 2014 dan di bawah terma-terma, sebarang jualan dan pelupusan aset plaintif di luar urusan perniagaan biasa dilarang antara 30 Disember 2013 hingga ke masa perjanjian langganan itu selesai. Defendan pertama kini menduduki tanah subjek dan mengendalikan *co-generation facility*. Plaintif mendakwa terhadap defendan untuk, antara lain, satu deklarasi bahawa perjanjian penjualan dan pembelian yang dikatakan bertarikh 1 Mac 2014 yang ditandatangani antara plaintif dan defendan pertama berkenaan dengan sebahagian tertentu tanah plaintif adalah batal dan tidak sah dan/atau boleh dibatalkan dan tidak mempunyai kesan undang-undang; satu deklarasi bahawa defendan kedua telah melanggar kewajipan fidusiari kepada plaintif; satu perintah bagi pemilikan kosong tanah subjek; ganti rugi, selanjutnya; dan/atau secara alternatif, sewa dan sewa dua kali pada kadar tertentu sehingga pemilikan tanah subjek diserahkan oleh defendan pertama kepada plaintif. Defendan menuntut balas terhadap plaintif untuk, antara lain, satu deklarasi bahawa plaintif telah diestop daripada menafikan kepentingan pemilik defendan pertama di tanah subjek sementara pengeluaran hak milik yang dipecah mengikut pecah bahagi tanah yang diluluskan yang dipegang di bawah dokumen hak milik TL 017544875; satu deklarasi bahawa hak milik dan kepentingan defendan pertama di tanah subjek adalah pemilik-penyewa menurut terma dan syarat pajakan yang ditawarkan oleh Kerajaan Negeri Sabah dan terkandung di dalam dokumen hak milik tanah subjek yang dipecah bahagi; satu perintah bahawa plaintif diarahkan

untuk memindahkan kesemua kepentingan tanah subjek kepada defendan pertama dalam masa 90 hari dari tarikh pengeluaran dokumen hak milik pecah bahagi bersama-sama dengan penyerahan dokumen hak milik yang dikeluarkan dengan defendan pertama didaftarkan sebagai penyewa semua kepentingan dalam tanah subjek bebas daripada semua bebanan. Isu-isu untuk pertimbangan adalah: (a) sama ada terdapat jangkaan atau jaminan bersama; (b) sama ada ss 131 dan 132E Akta Syarikat 1965 ('Akta') digunakan; dan (c) sama ada perjanjian penyewaan, dan lain-lain menafikan jangkaan bersama.

Diputuskan, menolak tuntutan plaintif dan membenarkan tuntutan balas defendan dengan kos RM50,000:

(1) Oleh kerana dokumen-dokumen sejarah mengesahkan atau menyokong apa yang dikatakan defendan kedua mengenai pembangunan resort, dan khususnya tanah subjek, ini merupakan pengakuan keterangan defendan kedua mengenai pembangunan dari tahun 1997 hingga plaintif, di bawah pengurusan baru, gagal untuk menghormati jangkaan atau jaminan bersama. Tiada apa-apa yang salah dalam mengiktiraf dan menyatakan bahawa plaintif adalah pemilik hak milik berdaftar. Ia tidak menafikan kewujudan jangkaan atau jaminan bersama. Ia adalah dengan cara bahawa plaintif menegaskan haknya sebagai pemilik hak milik berdaftar yang telah diestop berhubung dengan pendudukan defendan pertama dan penggunaan tanah subjek. Walaupun PH tidak mempunyai kedudukan untuk menjual tanah subjek, ia adalah *co-generation facility* dan semua aset lain di tanah subjek dan hak untuk memiliki dan mengendalikannya yang dipindahkan kepada defendan pertama dari PH. Dengan pemindahan itu, defendan pertama menjadi pengganti kepada semua hak PH termasuk hak kepada estopel hak milik kerana ia telah mengambil tempat PH yang memiliki aset dan tanah subjek (lihat perenggan 35 & 37–38).

(2) Plaintif, di bawah pengurusan baru, tidak boleh memohon peruntukan ss 131 dan 132E CA. Ia adalah kerana, pertama, PH dan defendan pertama sudah memiliki hak dalam tanah subjek sebelum dan bebas dari SPA. SPA adalah formaliti semata-mata untuk menyampaikan kepentingan yang bertujuan untuk pergi ke pemaju yang pada mulanya merupakan Rizab Sabah Electricity Sdn Bhd tetapi telah berkembang menjadi tanah yang dikhaskan untuk pembangunan *co-generation facility*. Kedua, jangkaan atau jaminan bersama di mana plaintif telah mengakui atau menggalakkan pergantungan oleh PH dan kemudian defendan pertama merupakan persetujuan termaklum dan kebenaran kandungan transaksi tersebut di bahagian plaintif. Ketiga, hak dan ekuiti defendan pertama mendahului SPA dan berbeza dan bebas daripadanya. Defendan pertama tidak mempertahankan SPA juga tidak memohon perlaksanaan spesifik SPA. Akhirnya, plaintif gagal untuk menghargai bahawa defendan tidak menggunakan pembelaan ekuiti untuk

mengatakan bahawa SPA telah memberi kepentingan kepada tanah subjek kepada defendan pertama dan defendan menggunakan pembelaan ekuiti untuk melindungi kepentingan di bawah SPA. Jangkaan atau jaminan bersama terjadi sejak dahulu, sejak tahun 1997 (lihat perenggan 40–42 & 47).

(3) Dari masa pembangunan *co-generation facilities* sehingga selesai pada tahun 1999 dan dari 1999 hingga 1 Disember 2002 apabila perjanjian penyewaan satu tahun telah ditandatangani, PH telah menduduki dan mengendalikan tanah subjek tanpa sebarang persetujuan tertulis dalam apa jua bentuk. Ini dengan sendirinya adalah keterangan lanjut tentang jangkaan atau jaminan bersama antara plaintif dan PH. Perjanjian langganan, yang mana defendan pertama bukan satu parti, tidak dengan cara apapun menentukan sama ada defendan pertama mempunyai hak untuk tetap di tanah subjek. Ia tidak mengesahkan atau menafikan jangkaan bersama antara PH dan plaintif yang berlaku jauh lebih awal, sejak tahun 1997. Tiada merit dalam hujahan plaintif bahawa kesamaan itu menafikan jangkaan bersama, kerana kesamaan yang dirujuk adalah di antara Jabatan Tanah dan Survei dan plaintif untuk menyelesaikan masalah yang dihadapi antara pihak berkuasa tanah dan pemilik tanah dalam pelaksanaan subdivisi (lihat perenggan 49, 53 & 62).

(4) Defendan telah berjaya dalam imbangan kebarangkalian dalam mewujudkan kewujudan jangkaan atau jaminan bersama antara PH dan plaintif dan unsur-unsur yang diperlukan untuk memohon prinsip ekuiti hak milik estoppel terhadap plaintif (lihat perenggan 65).]

Notes

For cases on interest in land in general, see 8(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3903–3907.

Cases referred to

Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1993] 3 MLJ 352; [1994] 1 CLJ 19, HC (refd)

Chin Chye @ Chew Chan Hock & Ors v Chew Ah Hwa (Pengerusi bagi Persatuan Khiam Thye Chew Seng Heng Wah Siah Teluk Anson, Perak mengikut seksyen 9(c) Akta Pertubuhan 166) [2016] MLJU 1229; [2016] 7 CLJ 567, HC (refd)

Devi v Francis [1969] 2 MLJ 169, HC (refd)

Inwards and Others v Baker [1965] 1 All ER 446, CA (refd)

Mok Deng Chee v Yap See Hoi & Ors [1981] 2 MLJ 321, SC (refd)

Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (executor of the estate of Loo Cheng Ghee) [1998] 4 MLJ 651; [1998] 4 CLJ 812, CA (refd)

Siew Soon Wah & Ors v Yong Tong Hong [1973] 1 MLJ 133, PC (refd)

Thorner v Major and others [2009] 3 All ER 945, SC (refd)

Legislation referred to

Companies Act 1965 ss 131, 131E, 132E
Electricity Supply Act 1990

Lim Hock Leng (Lim Guan Seng & Co) for the plaintiff.
David Fung (Alex Pang & Co) for the defendant.

Bexter Agas Michael JC:

INTRODUCTION

[1] The plaintiff claims against the defendants, jointly and/or severally for, inter alia, a declaration that the purported sale and purchase agreement allegedly dated 1 March 2014 entered into between the plaintiff and the first defendant in respect of a certain portion ('the subject land' or 'the co-gen land') of the plaintiff's land is null and void and/or voidable and has no legal effect; a declaration that the second defendant has breached his fiduciary duty owed to the plaintiff; an order for vacant possession of the subject land; damages, further and/or alternatively, rental and double rental at a specified rate until possession of the subject land is delivered up by the first defendant to the plaintiff.

[2] The first and second defendants counterclaim against the plaintiff for, inter alia, a declaration that the plaintiff is estopped from denying the proprietary interest of the first defendant in the subject land pending issuance of subdivided title following approved subdivision of land held under the surrendered document of title TL 017544875; a declaration that the first defendant's proprietary right and interest in the subject land is that of an owner-leaseholder pursuant to the terms and conditions of the lease offered by the State Government of Sabah and contained in the pending subdivided document of title to the subject land; an order that the plaintiff be directed to transfer the whole interest in the subject land to the first defendant within 90 days from the date of issuance of the thence subdivided issued document of title together with delivery up of the issued document of title with the first defendant registered as the leaseholder of all the interest in the subject land free from all encumbrances.

SALIENT FACTS

[3] The plaintiff, Sutera Harbour Gold and Country Club Bhd, is the registered proprietor of a parcel of land held under Town Lease No 017544875 measuring more or less 95.58 hectares or 238.63 acres and situate in Sembulan, District of Kota Kinabalu, Sabah ('the land').

[4] The second defendant, Ong Han Nam aka Edward Ong, is a director and shareholder of both the plaintiff and the first defendant.

[5] Profound Heritage Sdn Bhd (In Liquidation) (Company No 278658-X) ('PH') was granted a license under the Electricity Supply Act 1990 to generate electricity for sale and distribution to consumers within Sutera Harbour Resort. PH was wound up by court on or about 11 January 2012.

[6] The plaintiff was one of such consumers for the supply of electricity and a tenancy agreement dated 1 December 2012 ('tenancy agreement') was entered into between PH being the tenant and the plaintiff being the landlord over a specific portion of the land measuring approximately 1.459 acres ('the subject land') on which PH was to and did erect a building and sub-stations for the supply of electricity.

[7] By the tenancy agreement, inter alia, it was agreed between PH and the plaintiff that in consideration for the continued generation and supply of electricity by PH, PH agreed to pay rental in the sum of RM 5,558 per month for the first six months with the plaintiff's absolute entitlement to review the monthly rental after the end of six months. The tenancy agreement was for the period of one year from 1 December 2012 to 30 November 2013. The tenancy agreement came to an end on 30 November 2013 without any renewal or extension by the plaintiff.

[8] Pursuant to the assets sale agreement dated 12 July 2013 ('assets SPA'), PH sold the plant and machinery located on the subject land to the first defendant and the 'property' as defined therein/subject land was expressly excluded.

[9] By a sale and purchase agreement dated 1 March 2014 purportedly caused to be signed by Foo and Zarazilah, for and on behalf of the plaintiff and purportedly signed by the second defendant and Wong Lee Ken for and on behalf of the first defendant, the subject land was allegedly sold by the plaintiff to the first defendant for the purchase consideration of RM1,000 ('SPA').

[10] Wong Lee Ken ('Wong') was the chief financial officer of the plaintiff at the material time and a company secretary of the plaintiff between the period of 1 February 2014 to 24 April 2014. Wong was also a director and a company secretary of the first defendant since 22 March 2013 and 23 March 2013 respectively until she resigned on 5 August 2014 and 2 January 2015 respectively.

[11] Zarazilah is a director of the first defendant since 22 March 2013. Zarazilah was also a director of the plaintiff from the 19 December 1991 until

his retirement at the plaintiff's AGM on 30 June 2015.

[12] Foo is a director of the first defendant since 5 August 2014. He was also the chief executive officer of the plaintiff from 5 September 2005 until his resignation on 27 March 2014, and a director from 10 April 1995–27 March 2014.

[13] In March 2014, with the emergence of new investors, changes took place in the shareholding of the plaintiff, whereby the second defendant's stake in the plaintiff's ultimate holding company was reduced from 99.9% to 22.5%, with 77.5% being owned by the new investors. These changes arose from the agreement dated 30 December 2013 entered into between, inter alia, the second defendant, the plaintiff's ultimate holding company and the new investors ('the subscription agreement'). The subscription agreement was completed on 26 March 2014 and under its terms, any sale and disposal of the plaintiff's assets outside the ordinary course of business is prohibited between 30 December 2013 to such time the subscription agreement is completed.

[14] The first defendant, is presently occupying the subject land and operating the co-generation facility.

THE TRIAL PROCESS

[15] The trial of the claim was heard over six days on 19 June 2017, 20 June 2017, 21 June 2017, 22 June 2017, 23 June 2017 and 10 July 2017.

[16] The plaintiff had called four witnesses as follows:

(a) Liaw Lam Thye (PW1);

(b) Madeline Lee May Ming (PW2);

(c) Jasminder Kaur A/P Sarban (PW3); and

(d) Alex Ng Soon Heng (PW4).

[17] The first and second defendant also called four witnesses as follows:

(a) Daniel Tan Jwee Peng (DW1);

(b) Harold Mudi (DW2);

(c) Ong han Nam (DW3); and

(d) Wong Lee Ken (DW4).

A CONTENTIONS OF THE PARTIES

[18] The parties' respective positions and contentions can be distilled from the pleadings as summarised hereinafter.

B *Claim of the plaintiff*

[19] The plaintiff, being the legal owner of the land, claims that it is entitled to immediate ownership and possession of the subject land since the subject land is a part of the land. After the last tenancy agreement between the plaintiff and the first defendant had expired on 1 December 2013, the first defendant has since then been occupying the subject land as a trespasser. In respect of the SPA dated 1 March 2014 between the plaintiff and first defendant for transfer of the subject land at the nominal consideration of RM1,000, the plaintiff contends this is invalid as there was non-compliance with s 131E of the Companies Act 1960 and the SPA was entered into in breach of fiduciary duties owed by the second defendant as director to the plaintiff. The plaintiff claims that the consideration of the SPA is also grossly undervalue and its value is definitely more than RM250,000, which means that the SPA falls under the ambit of s 132E. Without the SPA the first defendant cannot claim to have any right to the subject land. The plaintiff therefore seeks for declarations that the SPA is void, the director's fiduciary duty was breached and that it is entitled absolutely to the subject land, and for the dismantling of the Co-Generation Plant within 21 days of the order, immediate possession of the subject land, and for accrued rental and damages as double rental from 1 December 2013 until delivery up of possession of the subject land.

Claim of the defendants

[20] The defendants deny that the plaintiff has the right to possession and ownership in the subject land, claiming that the right to possession is in the first defendant. The defendants while admitting that the first defendant had executed the SPA with the plaintiff for the consideration of RM1,000, do not admit that this was the basis for its right to occupy and own the subject land. Instead, the defendants' basis was that it is the common expectation or assurance from 1997 that PH and from July 2013, its successor, the first defendant, which occupied, expended money and developed the subject land would have the right to possess and own the property. PH under the control of the second defendant did just that with the agreement, encouragement, and acquiescence of the plaintiff, also at the material times under the control of the second defendant. Proprietary estoppel will protect PH's and now the first defendant's right to occupy and own the subject land. As for the enforceability of the SPA, this was not one that the defendants pursue as their legal basis was independent of the SPA though the event of the SPA forms part of the factual narrative of the case. In other words, it is submitted, that the resolution of the

plaintiff's contention on the SPA would not resolve the issue of who has the better right to the subject land.

[21] With regards to allegations of breach of fiduciary duty against the second defendant, the defendants argue that these are enveloped within the larger and encompassing issue of whether the proprietary estoppel raised by the defendants against the plaintiff does, or does not, prevent the plaintiff from exercising its strict legal right to claim its right to the subject land. If the proprietary estoppel is established then the plaintiff is estopped from depriving the first defendant's rights in the subject land and this right would a fortiori mean that the plaintiff is also estopped from raising the breach of duty against the second defendant who was acting for both the plaintiff and the first defendant to fulfil the common expectation.

ISSUE

[22] From the pleadings, the undisputed facts, the evidence given during the trial, the written submissions of counsels, the main issue in this case is who has the right to occupy, use and own the subject land. The determination of this main issue will in turn settles the other issues in this case.

FINDINGS OF COURT

Whether there is common expectation or assurance

[23] The plaintiff contends that no such common expectation arose and no proprietary estoppel applies in the circumstances of the present case. It is further submitted that the purported common expectation or assurance and estoppel are inconsistent with and/or contradicted by the subscription agreement dated 30 December 2013, in that the subject land was to be and is part of the entire parcel of land held under Master Title TL No 017544875 comprising 95.58 hectares/238.63 acres. Further, the purported common expectation or assurance was not disclosed during the due diligence exercises. The plaintiff says that sub-division of the land held under the master title is distinct from a wrongful transfer at a nominal sum of RM1,000 in breach of the said statutory provisions and the articles of association, the breach of the second defendant's fiduciary duty as a director and trustee of the plaintiff. Furthermore, according to the plaintiff, the subject land was expressly excluded from the assets sale agreement, referred to as the property therein, between PH and the first defendant dated 12 July 2013.

[24] The principle of proprietary estoppel is fairly established and has been applied by the Malaysian courts in various cases: see *Devi v Francis* [1969] 2 MLJ 169 (HC); *Mok Deng Chee v Yap See Hoi & Ors* [1981] 2 MLJ 321 (SC); *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993]

3 MLJ 352; [1994] 1 CLJ 19; *Chin Chye @ Chew Chan Hock & Ors v Chew Ah Hwa (Pengerusi bagi Persatuan Khiam Thye Chew Seng Heng Wah Siah Teluk Anson, Perak mengikut seksyen 9(c) Akta Pertubuhan 166)* [2016] MLJU 1229; [2016] 7 CLJ 567 (HC).

[25] The Supreme Court in *Mok Deng Chee* His Lordship Salleh Abas FJ, delivering the judgment of the court said at p 323:

> The law on tenancy coupled with an equity or simple equitable estoppel arose from the speech of Lord Kingsdown in *Ramsden v Dyson* (1866) LR 1 HL 129, in which His Lordship referred to the principle as irrevocable licence. This principle was accepted and applied by the Privy Council in *Plimmer v The City of Wellington* (1884) 9 AC 699. Finally it received its judicial refinement in *Inwards v Baker* [1965] 1 All ER 446. In this case Lord Denning MR defined the concept as follows:
>
> > It is quite plain from these authorities that, if the owner of land requests another or indeed allows another, to expend money on the land under an expectation created or encouraged by the landlord that he will be able to remain there, that raises an equity in the licensee such as to entitle him to stay. He has a licence coupled with equity that the equity arising from the expectation of land does not fail. The court can look at the circumstances and see whether there is any equity arising out of the expenditure of money.

[26] The principle is also known as equitable estoppel, because the landowner whose conduct has raised an expectation of his tenant of being allowed to stay on and thereby inducing him to spend money in respect of the tenancy is prevented from taking any action contrary to that expectation.

[27] In *Devi v Francis* at p 171, the court held that an irrevocable licence was raised by the equitable estoppel and that the landlord was prevented from terminating the tenancy. His Lordship Chang Min Tat J said:

> The defendant relied on the equitable doctrine of an irrevocable licence which was coupled with a grant, as in the following statement of Lord Kingsdown in *Ramsden v Dyson* at p 170 which though often cited bears repeating: The rule of law applicable to the case appears to be this: If a man, under a verbal agreement with a landlord for a certain interest in land or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promises or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation. This was the principle of the decision in *Gregory v Moghell* 18 Ves 328, and, as I conceive, is open to no doubt. If, on the other hand, a tenant in possession of land, and knowing the nature and extent of his interest, lays out money upon it in the hope or expectation of an extended term or as allowance for expenditure, then, if such hope or expectation has not been created by the landlord, the tenant has no claim, in which any court of law or equity can enforce.

[28] In *Siew Soon Wah & Ors v Yong Tong Hong* [1973] 1 MLJ 133 at p 135, the Privy Council in affirming the Federal Court also quoted from Lord Denning on *Inwards and Others v Baker* [1965] 1 All ER 446:

> All that is necessary is that the licensee should, at the request or with the encouragement of the landlord, have spent the money in the expectation of having been allowed to stay there.

[29] In the Supreme Court case of *Thorner v Major and others* [2009] 3 All ER 945, Lord Walker made the following remarks at pp 956–957:

> My Lords, this appeal is concerned with proprietary estoppel. An academic authority (*Gardner An Introduction to Land Law* (2007) at p 101) has recently commented: 'There is no definition of proprietary estoppel that is both comprehensive and uncontroversial (and many attempts at one have been neither)'. Nevertheless most scholars agree that the doctrine is based on three main elements, although they express them in slightly different terms: a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance. See *Megarry and Wade Law of Real Property* (7th Ed, 2008) para 16–001; *Gray and Gray Elements of Land Law* (5th Ed, 2009) para 9.2.8; *Snell's Equity* (31st edn, 2005) paras 10–16 to 10–19; G*ardner An Introduction to Land Law* (2007) para 7 January 1).

[30] As submitted by the defendants' counsel, the essential elements for the successful invocation of proprietary estoppel in the present suit to be satisfied by the defendants can be expressed as follows:

(a) there is a common expectation or assurance created or encouraged by the plaintiff in PH from 1997, and since July 2013 the first defendant, that the person who develops the subject land would occupy and own it;

(b) PH had in reasonable reliance on the common expectation or assurance expended money and time to develop the subject land into a co-generation facility and then the first defendant in taking over the property; and

(c) the plaintiff had encouraged and/or acquiesced in PH's and the defendants' reasonable reliance to the defendants' detriment so that it is unconscionable for the plaintiff to deny the common expectation or assurance by insisting on the plaintiff's strict legal right as registered owner of the land.

[31] The second defendant (DW3) in his evidence had given a detailed account of the development of the whole Sutera Harbour Resort from the beginning. He being the founder of Sutera Harbour Resort who conceived of the idea and pioneered its development from conception to completion was well positioned to provide a historical perspective on the matter. The comprehensive development plan for the resort is found on p 652 of CBD2,

which shows the extent of the resort. The grand opening of the resort was in July 2000. Together with the directors, the second defendant had to plan, implement, and navigate the development of the resort and then manage it right through to what it was as at 27 March 2014, after which date, the new investors became the majority shareholders, with the second defendant remaining a director and a minority shareholder.

[32] The second defendant testified as follows (pp 176–181 NOP):

Q5 Could you relate the development of the Co-Gen Land in relation to that of Sutera Harbour Resort?

A5 Yes. I would start of by saying that the development of the Resort was on 7 parcels of land which the Sabah State Government alienated and issued for the development. The location is the coastal area in Sembulan, Kota Kinabalu. I refer to the approved Comprehensive Development Plan for the Resort on p 652 of CB2 prepared by Akitek Billings Leong & Tan Sdn Bhd. The Resort comprises 150 bungalow lots, local roads and waterways, a 27-hole golf course and club-house, Yacht Club, Sport facilities, one 5-star business hotel, one 5-star resort hotel, condominium units, and main access road to the various parts of the Resort. I point out the various SESB sub-stations/switchgears which are provided for in the Comprehensive Development Plan. SESB stands for Sabah Electricity Sdn Bhd, the electricity authority in the State of Sabah.

The dispute in this suit centres on the Co-Gen Land which started life as a SESB sub-station earmarked on the part of the Resort held under TL 017544875 measuring 95.58 hectares ('the land'). One can identify it as the SESB sub-station in the easterly side of the Resort adjacent to the coastal highway. It can also be seen in the Tanjung Aru Local Plan on p 655 of CB2. It is marked 'purple-stripe' in the Local being land reserved for public utilities, its land use, on the Resort and is the biggest of the sub-stations on the Resort. You can barely see the marking of the other sub-stations in the Local Plan.

Q6 Is there a development plan of TL 017544875 ('the land') in CB2?

A6 Yes, and I refer to it now at p 653 of CB2. The land is for that part of the Resort which contains the 27-hole golf course and Club House, Yacht Club and sport facilities.

Q7 Please explain the development of the land in relation to SESB's substations.

A7 Following on from the Comprehensive Development Plan, on the land there are 4 lots of land reserved for SESB with their conditions imposed by MPKK. These, amongst others, are conditions for the approval for the development of the land. The 4 lots can be seen on the Development Plan marked with an 'x' in a square. The SESB requirements are endorsed on this approved Development Plan and can be seen towards the right-bottom section of the Plan. Condition G states, 'LAND TITLE FOR THE SUB-STATION SITE SHALL BE TRANSFERRED TO THE SABAH ELECTRICITY BOARD'.

As is normal for such development, I understand that the developer shall be responsible to fully contribute capital to the development of the sub-stations and

then after completion of the development, and especially upon issuance of the sub-divided title to the SESB plots, to transfer the title under a sale and purchase agreement to SESB for a nominal value.

3 out of the 4 lots reserved to be transferred to SESB upon issuance of the sub-divided titles to those lots, this is what will be done. The exception is for the SESB reserve that subsequently evolved into the development of a Co-Generation Facility on the Co-Gen Land.

Q8 How did that happen?

A8 This was necessitated by the imminent requirement of the Sutera Harbour Resort of around 7MW and the inability of the SESB to supply such power needs without the frequent interruptions of electricity supply Kota Kinabalu was experiencing in the mid-1990s. When such power need was obvious and no viable solution could be given by SESB, it was the plaintiff's decision that the running of the 5-Star resort facility on the land with the frequent electricity supply interruptions cannot be the way forward for Sutera Harbour Resort. I was very concerned that the Resort itself should be assured of constant and uninterrupted power supply. Since we were going to operate a 5-Star resort, I have to ensure that the electricity supply must be uninterrupted for the Resort.

I sought the Minister of Energy, Telecommunications and Post to overcome the insufficient power for the Resort. The Ministry helpfully agreed to grant a licence under the Electricity Act 1990 to the developer of the Co-Generation Plant and Facility to generate such electricity. Since the development and running of the Co-Generation Plant is going to be separate from that of the Resort, it was decided that another company, Profound Heritage Sdn Bhd ('PH'), should develop, finance and run the Plant. It was then understood between the plaintiff, the owner of the land, and PH that the latter would be the incorporated company to develop and operate the Co-Generation Facility to supply all the power needs of Sutera Harbour Resort. PH was granted the licence to generate electricity for sale and distribution to consumers within the Resort and any excess to SESB at a nominal sum. In this sense, although the Co-Generation Facility has a capacity of 38MW it is in the manner of but unlike an independent power plant as its special licence is limited.

As it transpired, the development of the Co-Generation Facility on the Co-Gen Land proceeded on the common expectation and assurance between the plaintiff and PH, both of which were at that time under my directorship and general management, that the person who develops the Co-Gen Land would occupy it and own it. In other words, when the sub-divided titles to each of the 4 plots reserved for SESB as required under the approval of development of the whole Resort as well as the land, are issued the 3 plots which remained as SESB sub-stations will be transferred to SESB and the 1 plot which has evolved into the Co-Generation Facility will be transferred not to SESB but to the developer of the Co-Generation Facility on that plot. I would also add that since the first defendant, Omega Brilliance Sdn Bhd, was the incorporated company which was chosen to take over ownership, use and occupation of its predecessor PH's rights, interests and property, it was also on such common expectation that it had proceeded until the present time.

[33] During cross-examinations (p 257 NOP), the second defendant was steadfast on the existence of the common expectation or assurance:

> PUT: I put it to you that there was no such common expectation or understanding, but at most, an intention on your part to wrongfully transfer the subject land to the first defendant which is owned and controlled by you.
>
> A: No.
>
> PUT: I put it to you that even if there was such common expectation or understanding, these were contradicted or superseded by statements in the subscription agreement and the prospectus to which you had been referred to, apart from the resolutions signed by you approving the prospectus.
>
> A: I disagree.

[34] The second defendant due to his position in the plaintiff and PH at the material time has the personal knowledge to testify to the truth of the fact of such a common expectation or assurance and its content. The evidence-in-chief of the second defendant in which he testified of the relevant past events are relevant (pp 181–194 NOP):

> Q9 Given that, as you said, this was the common expectation of the parties concerned, did the parties proceed or act on it?
>
> A9 Yes certainly. In reliance on the common expectation or assurance from 1997, PH, and since July 2013 the first defendant – with the knowledge, and acquiescence and/or encouragement of the plaintiff – planned, decided and then carried out various actions that are required in fulfilment of the common expectation.
>
> Q10 What are these various actions?
>
> A10 There are many and I shall list them as follows:
>
> (a) In 1997 both the plaintiff and PH instructed their mutual architect Arkitek Billings Leong & Tan Sdn Bhd to prepare a development plan for the development of the Co-Gen Land into a Co-Generation Facility with its own access road to be developed by PH. I refer to the Development Plan for the development of the Co-Gen Land into Co Generation Facilities under Drawing No SHR/BLT/2806, which is separate from the development of the Resort, at p 642 of CB2. Please note that PH signed as the Developer, with the plaintiff signing as the landowner of TL017544875;
>
> (b) To apply and obtain approval from the then Municipal Council of Kota Kinabalu ('MPKK') for the separate development of the Co-Gen Land into a Co-Generation Facility. The approval was granted on 30 June 1998 (see the Development Plan at p 642);

(c) Obtaining the special licence under the Electricity Act 1990 from the Ministry to PH for a Co-Generation Facility to generate power and electricity on the Co-Gen Land;

(d) Development of the Co-Gen Land by PH to house, equip, and install the Co-Generation Facility at a total cost of approximately RM155 million between the Year 1997 to the Year 1999. I refer to the Certificate of Valuation dated 15 March 1999 issued by PH for the Turnkey Contract for the works which amounted to RM155 million at p 57 of CB1. The turnkey contractor Pembinaan OCK (Malaysia) Sdn Bhd claimed for the final payment as shown in its letter dated 3 March 1999 to PH (p 56 of CB1);

(e) To obtain finance for the development of the Co-Gen Land from Malayan Banking Bhd and specifically the facility from Bank Islam (L) Ltd of USD24 million;

(f) The plaintiff's letter of undertaking to Bank Islam dated 16 June 1999 that it would undertake, amongst others, to execute a charge over the Co-Gen Land upon the sub-division of the land. I refer to the plaintiff's letter of undertaking to Bank Islam at pp 59–60 of CB1. In respect of Bank Islam's granting this financial facility to PH for the development of the Co-Generation Facility on the Co-Gen Land, the main lender to the plaintiff and PH, Malayan Banking Bhd, had on 16 June 1999 given a Letter of Exclusivity to Bank Islam to exclude the Co-Generation Plant and Facility and the land on which it is sited (the Co-Gen Land) from its charge and expressly disclaimed any right and interest on the CoGeneration Plant and Facility and the Co-Gen Land on which is built (please see Letter of Exclusivity at p 58 of CB1);

(g) The plaintiff instructed its land surveyor Jurukur Tempatan Sdn Bhd ('JTSB') in 1999 to apply for subdivision of the land into sub-divided lots including the lot demarcated specifically as the Co-Gen Land. JTSB duly prepared the Drawing Plan No JTSB — 07 — SS04 for the proposed subdivision of the land which is at p 654 of CB2. This 'Development Plan' for subdivision of the land for the purpose of excising of SESB sub station and PH's Co-Generation Station was approved by MPKK on 15 July 1999 under Serial No DP/008/05.99 (see p 61 of CB1). On 2 August 1999, the plaintiff submitted to the lands and Surveys Department for subdivision of the land into 5 separate titles, that is, into 1 main subdivided title for golf course, club and Yacht Club etc and 4 sub-divided titles for SESB sub-station and Co-Generation Station;

(h) The condition of Bank Islam's financial facility to PH that Bank Islam should have an exclusive charge over the Co-Gen Land and because of Bank Islam's security right the other financial institutions providing finance to the development of Sutera Harbour Resort in 1999 disclaimed and excluded the Co-Generation Facility and the Co-Gen Land on which it sits from the ambit of the security over the land. See Malayan Banking Bhd's Letter of Exclusivity dated 16 June 1999 (p 58 of CB1 referred to above);

(i) After PH spent the total sum in the region of RM155 million to develop the Co-Gen Land, and by 1999 when the Co-Generation Facility was in full operation it was able to generate sufficient electricity to supply the Sutera Harbour Resort, a greater part of which was the plaintiff's power requirement;

(j) The electricity supply and transmission network constructed on the CoGen Land was such that the transmission network is interconnected in relation to the transmission of electricity to the Sutera Harbour Resort through the Co-Gen Plant and/or SESB's Sub-station plants;

(k) The subdivision of the land took a long time and in the interim before the subdivided titles could be issued, the plaintiff as registered title holder and PH executed yearly tenancy agreements between them for the SESB sub-stations and the Co-Gen Land. See Tenancy Agreement dated 1 December 2002 at pp 77–82 of CB1. I understand from the plaintiff's and PH's officers and advisers that this was in the main for tax reasons since the land title of those as yet undivided lots were still held in the plaintiff's name. See facsimile note from the plaintiff's officer Ms Jenny Leung to Ms Lisa Chan dated 10 April 2001 at p 64 of CB1;

(l) When the first offer consequent on the application for subdivision of the land was given by the lands and Surveys Department on 29 October 2004, the premium payment offered for the Co-Gen Land was RM3,000,000.00. See pp 83–86 of CB1 for the letter dated 29 October 2004. The plaintiff by letter dated 12 January 2005 explained the nature and reason for the Co-Generation Facility on the Co-Gen Land, which though with licence to produce power was unlike an independent power producer as it was not allowed to sell electricity to the public but had to sell excess power generated to SESB at a nominal sum, and on this basis asked for premium to be set at a value commensurate with premiums for substations in other developments. I refer to the plaintiff's letter dated 12 January 2005 at p 87 of CB1;

(m) On 27 July 2007, the lands and Surveys Department gave another offer consequent on the application for subdivision with the premium set at RM4,000, which the plaintiff on 17 October 2007 accepted and paid the premium. I refer to the letter of offer dated 27 July 2007 at pp 93–97 of CB1;

(n) Meanwhile PH was wound up by the Court on or about 11 January 2012 with liquidators appointed, and Bank Islam wrote to the plaintiff on 16 January 2013, reminding the plaintiff of its undertaking and Bank Islam's interest over PH's assets and the Co-Gen Land in the light of the offer for subdivision of the land. See Bank Islam's letter dated 16 January 2013 at p 106 of CB1;

(o) On behalf of the Sutera Harbour Resort, which included the plaintiff, I wrote on 26 March 2013 to the liquidators of PH to inform that I had reached an agreement with Bank Islam to settle its debt through payment of the sum of RM33.6 million to Bank Islam by the first defendant. This

sum shall represent the purchase price of PH's Co Generation plant and machinery on the Co-Gen Land in order to discharge Bank Islam's charge over the plant and machinery and all other securities, and that as regards the Co-Gen Land that would be another matter to be dealt with in a separate agreement to be entered into between the plaintiff and the first defendant. I refer to my letter dated 26 March 2013 to PH's liquidators at pp 115–116 of CB1;

(p) Payment of the settlement sum of RM33.6 million by me through the first defendant to Bank Islam, who is also the chargee, on 29 March 2013. I refer to Bank of Islam's letter dated 22 March 2013 to me at pp 113–114 of CB1 and Bank Islam's letter to me dated 1 April 2013 at p 122 of CB1.

(q) My instruction on behalf of the plaintiff and the first defendant to Messrs Jayasuriya Kah & Co, advocates and solicitors, on or about 22 April 2013 that since the law firm is already handling the sub-division of the land and as the subdivided land, the Co-Gen Land, were to be transferred to the first defendant the law firm could assist with the preparation of the sale and purchase agreement between the plaintiff and the first defendant for the nominal value of RM1,000.00. I refer to the email on 22 April 2013 from Ms Wong Lee Ken, the Chief Financial Officer, to Mr Daniel Tan, senior partner of Jayasuriya Kah & Co and his reply on 30 April 2013 at pp 215–216 of CB1. Earlier, on 20 September 2012, the plaintiff had also decided and resolved that the plaintiff as landowner surrender the title deed to the land for subdivision and conversion and had authorised Messrs Jayasuriya Kah & Co, the solicitors already appointed by the Malaysian Trustees Berhad, to present the title deed to the land office and had irrevocably authorised it to collect the subdivided titles and return them to Malaysian Trustees Berhad for custody. See the Directors' Circular Resolution of the plaintiff on pp 98–99 of CB1.

(r) The plaintiff's letter (written by me in my capacity as President of Sutera Harbour Resort) to the lands and Surveys Department dated 28 January 2014 to request for an amendment of the accepted letter of offer because the Co-Gen Land has a different basis of ownership and operation than the other sub-station lots operated by SESB which were intended to be transferred to SESB or surrendered to the state government. I had written this letter because it was intended by the plaintiff that when the subdivided title is issued for the Co-Gen Land it will be transferred from the plaintiff to 1st defendant, which by then occupied and operated the Co-Gen Plant sited on it, whereas the subdivided titles for the other 3 SESB lots will be transferred from the plaintiff to SESB. The consideration for all the four transfers will be nominal. It would be pointless if the Co-Gen Land can only be transferred to SESB and not the first defendant. I refer to my letter dated 28 January 2014 to the lands and Surveys Department at pp 367–368. The first defendant had already purchased the Co-Gen Plant and Facility as a going concern on the Co-Gen Land under the assets sale agreement between PH and it on 12 July 2013 (pp 233–267 of CB1) after settlement of Bank Islam's debt of RM33.6 million by the first defendant through funds provided by me;

(s) The plaintiff's acceptance, under the new management, of the amended offer contained in the Director of Lands and Surveys Department's letter dated 1 October 2014 to the plaintiff, which offered to amend the previously accepted letter of offer dated 27 July 2007 by revising the rent, stipulating the use as 'Industrial (Co Gen Plant)' and deleting the prohibition of transfer to anyone save for SESB and the state government. I refer to the accepted Director's letter to amend offer dated 1 October 2014 at p 486 of CB2;

(t) The execution of the Sale and Purchase Agreement on 1 March 2014 by the plaintiff and the first defendant ('the SPA') for the transfer of the Co Gen Land at the nominal value of RM1,000.00 upon the issuance of the subdivided title to the Co-Gen Land. Although prepared earlier and before the new investors were introduced in October 2013, the SPA was only a formality to convey the Co-Gen land upon subdivision and issuance of sub-divided title to the first defendant as intended under the common expectation; and

(u) The plaintiff's request and engagement of the accountant firm Ernst & Young to file the real property gains tax forms for the transfer of the Co-Gen Land from the plaintiff to the first defendant. I refer to the letters from Borneo Ventures Pte Ltd to me dated 4 September 2015 (at pp 494–496 of CB2) and 14 September 2015 (at pp 498–499 of CB2) and my replies dated 9 September 2015 (at p 497 of CB2) and 16 September 2015 (at p 500 of CB2) respectively to each of the letters.

Q11 What will happen if the common expectation or assurance is dishonoured or denied?

A11 PH and the first defendant would suffer a detriment were the common expectation or assurance relied upon by them to be reneged, denied or dishonoured by the plaintiff. They would have developed the Co-Gen Land incurring the requisite expenditure, expertise and time over the years without the benefit of a registered leasehold ownership over the land for which the subdivision of the land into the subdivided lots comprising the Co-Gen Land and SESB's sub-station lots were intended to fulfil.

Q12 Is it right or equitable for the plaintiff under the new management to deny the common expectation or assurance?

A12 It is unconscionable for the plaintiff to resile from, deny or dishonour the common expectation or assurance for the equity the first defendant has in the Co-Gen Land that was raised by, as my solicitor has advised, the proprietary estoppel. My intent and conduct throughout is in accordance with the common expectation or assurance that had existed between the plaintiff and PH (and then the first defendant) until the plaintiff changed its position from 25 September 2015 onwards and carried on into the present suit. At the earliest opportunity after the plaintiff's Singapore lawyers issued demands before action for the Co-Gen Land, I had written direct to Datuk Sam Goi in my letter dated 6 October 2015 (at pp 518–519 of CB2) stating the same intention for the Co-Gen Land.

[35] The events narrated by the second defendant correspond with contemporaneous documentary evidence from 1997 right until the plaintiff's acceptance of the amended offer from the Director of Lands and Surveys Department's letter dated 1 October 2014, and except for the instruction to Mr Daniel Tan (DW1) in April 2013, were not challenged. The approved development plan, planning approval, subdivision of the land and accepted amended offer to subdivide themselves together with other contemporaneous evidence and the nature of the plaintiff's allegations support the defendants' version. Further, the plaintiff's key witness, Alex Ng (DW4) himself admits in cross-examination that the second defendant is the person qualified to give evidence from the inception of Sutera Harbour Resort until now (see p 112 lines 7–10). Therefore, and I agree with the defendants' counsel that since the historical documents do in fact verify or corroborate what the second defendant said on the development of the resort, and in particular the subject land, this amounts to an admission of the second defendant's above-quoted evidence on the development from 1997 until the plaintiff, under the new management, failed to honour the common expectation or assurance.

[36] The development of the Co-Generation Facility is never disputed. The expenditure by PH on the subject land is in the region of RM155m (see pp 56–57 of CBD1). Mr Harold Mudi (DW2), the former Plant Manager of PH, gave evidence that he was there as plant manager when the subject land was developed into the co-generation facility (pp 158, 160 NOP). Mr Liaw Lam Thye (PW1), registered valuer, gave evidence and presented valuation report that the subject land as at 1 March 2014 is valued at RM 12.7m as a tourist complex and RM8.9m as industrial land (p 9 NOP). The defendants had to pay Bank Islam the sum of RM33.6m to settle its debt in March 2013 to discharge Bank Islam's charge over the assets and the subject land.

[37] The plaintiff claimed that the second defendant and other directors and/or members of the plaintiff had knowledge of and represented through their prospectuses and resolutions that the plaintiff is the registered and beneficial owner of the land. I agree with the defendants' counsel that there is nothing amiss in recognising and stating that the plaintiff is the registered title owner. This was never a disputed fact. It does not in any way negate the existence of the common expectation or assurance. It is in the manner that the plaintiff now insists on its strict rights as registered title owner that is being estopped in relation to the first defendant's occupation and use of the subject land.

[38] In respect of the assertion by the plaintiff that, since the asset sale agreement (pp 233–267 CBD1) is a sale of PH's assets but excluding the subject land that there is no way the first defendant though it owns all the assets situated on it can now say that it has a right or interest in the subject land, again,

this must be viewed in the context of the first defendant's right raised by the proprietary estoppel. Whilst PH is in no position to sell the subject land, it is the co-generation facility and all other assets on the subject land and the right to own and operate it that was transferred to the first defendant from PH. With the transfer, the first defendant became the successor to all the rights of PH including the right to the proprietary estoppel since it has taken PH's place in possession of the assets and the subject land.

[39] In *Mok Deng Chee*, the tenancy together with the equity passed on from the person who expended money on the land in building the house to the purchaser of the house and on the purchaser's death to his son, the appellant. The Federal Court held (p 323):

> The house was built by Hong Kong who rented the ground from the previous owner of the land. In the absence of any contrary evidence, we assume that the house must have been built with encouragement and approval or at least without any objection by the previous landowner. Thus the expenditure involved in its construction raised in favour of Hong Kong an equity making him a tenant with an equitable estoppel. The tenancy together with its equity devolved on to the appellant's father, when Hong Kong sold the house to him, and n his father's death the equity devolved on the appellant as a result of the transmission of the house to him. The house owner continued to enjoy their tenancy undisturbed right up to the time when the respondents became the owners of the land in 1969. The transfer of the land to the respondents made no difference to the tenancy and equity of the appellant.

Whether sections 131 and 132E of the Companies Act 1965 apply

[40] The defendants' counsel gave four reasons, with which I agree, why the plaintiff, under its new management, could not apply the provisions of ss 131 and 132E of the Companies Act 1965 to the circumstances of this case.

[41] The first reason is that PH and then the first defendant already possessed the right in the subject land prior to and independent of the SPA. The SPA was a mere formality to convey the interest which was intended all along to go to the developer in what was initially a SESB Reserve but had evolved to become a land reserved for the development of a co-generation facility. In his evidence, the second defendant said that it was a formality and that following his decision to raise finance to pay Bank Islam's debt and redeem the assets and security over the subject land he had instructed Mr Daniel Tan of M/s Jayasuriya Kah & Co in April 2013. Mr Daniel Tan (DW1) in examination in-chief testified that he was engaged to attend to the subdivision of the land by either the plaintiff or the Malaysian Trustees Bhd (chargee/security agent for consortium of lenders to the plaintiff). He said he was also requested by the defendants to prepare the SPA in April 2013. Ms Wong (DW4) when questioned during cross examination that the SPA was only executed after the subscription agreement was signed on 1 December

2013 and not before as was intended, said that it was overlooked for a year because it did not make sense for the parties not to proceed with it immediately since the redemption sum had been paid to Bank Islam (see pp 286–287 NOP). The SPA was not duly executed before the new investors signed the subscription agreement as it was always the common expectation of the parties that the developer of the subject land would own the subject land that it was done, and that the consideration is nominal.

[42] The second reason is that the common expectation or assurance in which the plaintiff has acquiesced in or encouraged reliance by PH and later the first defendant constitutes informed consent and authorisation of the substance of the transaction on the plaintiff's part (see *Snell's Equity* (33rd Ed) paras 7–016, 7–019).

[43] The third reason is that if the first defendant can establish that it has a proprietary right or equity in the subject land, this court would protect that right without the SPA. The SPA for a nominal consideration was only intended as a formality to grant a right which at the outset was expected and assured to belong to the one who developed the property as intended by the plaintiff and the developer of the subject land. The first defendant's right and equity therefore predates the SPA and is distinct and independent of it. Here the first defendant is neither defending the SPA nor seeking specific performance of the SPA.

[44] Finally, the second defendant testified that as regards the eventual new investors, the relation began in October 2013 when he first met with one Datuk Goi Seng Hui aka Sam Goi who represented the then potential new investors. Datuk Sam Goi was staying in the resort and could see for himself the properties of the resort. In the course of discussions, the second defendant told Datuk Goi and the latter understood that the subject land on which the co-generation facility was sited was a separate development and not part of the deal for the new investors. The first defendant which occupied the subject land and ran the co-generation plant is not part of the Sutera group of companies and does not comprise part of the investment exercise. Although the second defendant was challenged during cross-examination on this conversation with Sam Goi, he was unshakeable in his evidence. Alex Ng (PW4) admitted in cross-examination that the report and valuation dated 24 April 2013 of the Sutera Harbour Golf and Country Club was given to the new investors before the new investors bought the majority stake in the plaintiff (see p 79 NOP). The importance of the report and valuation is that it was clearly stated by the plaintiff under the second defendant's management and control as a fact that the land value is based on the net area of 94.90 hectares though 95.58 hectares is the land area of the land. This net area is obtained after deducting the area of substations (p 127 of CBD1). Under the terms of reference for the report and

valuation it was stated that the subject matter of the valuation is the Sutera Harbour Golf & Country Club developed on the land having a titled land area of 95.58 hectares with all the buildings, facilities and golf course on it except for the co-generation plant sited on the subject land. After referring and relying on the subdivision plan bearing No JTSB-07-SS04 prepared by JTSB, which is attached to the report, it was explained that the net area is about 94.90 hectares after deducting areas for sub-stations and this was the effective land area for the valuation.

[45] The second defendant also testified that eventually, in essence, the deal that was agreed with Datuk Goi is for Borneo Ventures Pte Ltd to subscribe to shares in the plaintiff and other companies in the Sutera Harbour group. The new investors would pay off approximately RM700m debts owing by the companies and this culminated in the subscription agreement dated 30 December 2013 (at pp 296–361 of CBD1). PH (and later the first defendant) was not one of those companies.

[46] The debt of PH was paid off by the second defendant through the first defendant and Bank Islam's security over the subject land was redeemed by them.

[47] The plaintiff referred to the breaches of ss 131 and 132E of the Companies Act 1965 to invoke the broad equitable maxim that equity must follow the law and that equity does not operate against statute to argue that the equitable principle of proprietary estoppel therefore cannot apply. It is to be noted that ss 131 and 132E of the Companies Act 1965 were raised by the plaintiff to defeat the SPA in that those breaches by the second defendant as a director and shareholder of the plaintiff and the first defendant rendered the SPA invalid and void. The plaintiff failed to appreciate that the defendants are not invoking the aid of equity to say that the SPA had given an interest in the subject land to the first defendant and the defendants were invoking the aid of equity to protect that interest under the SPA. The common expectation and assurance occurred long before, since 1997.

Whether the tenancy agreement, etc negates the common expectation

[48] The plaintiff also used the tenancy agreement dated 1 December 2012 (pp 100–105 CBD1) to advance its argument that PH only have rights to occupy the subject land for one year while the plaintiff being the landlord had proprietary rights over the subject land and that there is nothing to say that the subject land will be transferred to PH, the landlord having discretion to determine or renew the agreement. However, as contended by the defendants' counsel, the question to be asked is whether PH had expended the sum of RM155m to develop the subject land into the co-generation facility because of

the power needs of the Sutera Resort upon the common expectation or assurance created and encouraged by the plaintiff that the developer has rights of occupation and ownership. Here, as pointed out by the defendants' counsel, the obvious evidence to look at is the evidence of the development of the co-generation facility by PH with the plaintiff's clear encouragement for the separate development of the subject land by PH in 1997. The separate development plan (Drwg No SHR/BLT/2805) dated December 1997 for the development of the co-generation facilities on the subject land was prepared by the plaintiff's and PH's common architect and jointly signed and thus consented to by the plaintiff as landowner of the land and PH as the developer on the development plan (p 642 of CBD2). The development plan itself is the clearest evidence that there must be such a common expectation or assurance, for no person would spend RM155m in developing the co-generation facilities and thereafter to operate the facilities if the person had no rights or occupation or ownership of the facilities including the building and land if it does not have rights over both.

[49] The development of the co-generation facilities was completed in 1999. From the time of development of the co-generation facilities until completion in 1999 and from 1999 until 1 December 2002 when the one year tenancy agreement was entered, PH had occupied and operated the subject land without any written agreement of any sort. This in itself is further evidence of the common expectation or assurance between the plaintiff and PH.

[50] With regards to the tenancy agreement dated 1 December 2002 and subsequent tenancy agreements, the second defendant had explained that since PH was operating the facilities on the subject land, it was for tax reason that this was done in 2002 (p 186 of NP) since the plaintiff is the land title owner. It is again stressed that the defendants are not denying the fact that the plaintiff is the landlord and title-owner of the land which includes the subject land. This is where the principle of proprietary estoppel is resorted to. The principle of proprietary estoppel would give the tenant whose tenancy is coupled with an equity remedial redress because the landowner whose conduct has raised an expectation of his tenant of being allowed to stay on and thereby inducing him to spend money in respect of the tenancy is prevented from taking any action contrary to that expectation (see *Mok Deng Chee* at p 323)

[51] The plaintiff also tried to capitalise on the defendants' redemption of PH's debt of RM33.6m owed to Bank Islam, using the fact that the second defendant gave a personal guarantee for the debt and the fact that the redemption payment was only for the assets on the subject land which included the co-generation facilities but not the land itself as nullifying the common expectation between the plaintiff and PH and subsequently the first defendant. The plaintiff premised its argument on the fact that the second defendant never

stated to the liquidators that PH had a proprietary interest and that the assets sale agreement excluded the subject land. The defendants replied that the redemption of the debt owed to Bank Islam which also constitute a purchase of the assets built on the subject land does not in any way negate the common expectation. The subject land which is part of the land is owned by the plaintiff and not PH. The liquidators knew this very well and any issue of rights over the subject land itself must be between the redeemer and the plaintiff. What is important was that Bank Islam's claim over the assets and its equitable third-party charge over the subject land is discharged by the payment of the redemption sum. This, according to the defendants, was why in the second defendant's letter to the liquidators of PH dated 26 March 2013, after agreeing to the payment of the redemption sum of RM33.6m, in the last paragraph of the letter it was expressly stated as follows (p 116 of CBD1):

> This offer excludes the land where the Sutera Harbour Cogeneration Facility is situated. A separate agreement will be entered into between Omega Brilliant with the landowner thereof, Sutera Harbour Golf and Country Club Berhad (21904-P). For avoidance of doubt, the sale of the land is independent from the sale of the Assets.

[52] This, to me, proved the common expectation rather than negating it. The liquidators acting on behalf of PH in liquidation cannot deal in what they do not have. The fact of the consideration at the nominal sum of RM1,000 therefore evidences the fact that the person who had developed the subject land would be entitled to occupy and own it. Further, it is obvious that the one who redeems is the one who will eventually be the owner of the subject land. The assets including the co-generation facilities sit on and is attached to the land. It is inconceivable that someone would pay the redemption sum of RM33.6m for those assets unless the redeemer expects or is assured that the land on which the assets were constructed would belong to him.

[53] The subscription agreement, to which the first defendant is not a party, does not in any way determine whether the first defendant has the right to remain on the subject land. It neither affirms nor negates the common expectation between PH and the plaintiff which occurred very much earlier, since 1997.

[54] The plaintiff also refer to the correspondences between the Department of Lands and Surveys ('L&S') and the plaintiff from 29 October 2004 to 27 July 2007 which the plaintiff asserts as clearly showing there was no common understanding by the plaintiff that the subject land would be transferred to PH/first defendant for a nominal value. These correspondences, are the first letter of offer for subdivision of the land from L&S to the plaintiff dated 29 October 2004 (pp 83-86 CBD1); letter from the plaintiff to L&S

dated 12 January 2005 (p 87 CBD1); and the second letter of offer for subdivision of the land from DL&S to the plaintiff dated 27 July 2007 (pp 93–97 CBD1).

[55] The first letter of offer dated 29 October 2004 was not accepted by the plaintiff (see p 84 CBD1). The reason why the plaintiff did not accept is contained in the plaintiff's letter to DL&S dated 12 January 2005 (p 87 CBD1) which stated that the premium set for the subject land at RM3m was too high. It was explained that the nature of the co-generation facility on the subject land is unlike that of an independent power producer (IPP) where the power could be sold to the public. The plaintiff asked that the premium set at RM3m be reduced. The L&S revised its offer and gave the second letter of offer dated 27 July 2007, which reduced the premium to RM4,000 and which the plaintiff duly accepted and paid the premium (see pp 93–94 CBD1).

[56] However, it is pointed out by the defendants that there remains an inherent error in the second letter of offer which is inconsistent with the use and status of the subject land in contradistinction with other subdivided titles for the other 3 SESB sub stations. For there remains the conditions 'For SESB Reserve' which as it stood then under the accepted second letter of offer stipulated (p 95 CBD1) as follows:

> For SESB Reserve The said land is demised herein expressly and only for the purpose of erecting thereon for use as such an electricity substation by Sabah Electricity Board. Subdivision of this title is prohibited. Transfer and sublease of this title is prohibited except to Sabah electricity Board or the title may be surrendered to State Government.

[57] These special conditions were intended to apply to the three subdivided lots meant for SESB sub-stations. However, as it stood, it would apply to the subject land as well, since no distinction was made for the subdivided lot meant for the subject land which was occupied and operated by PH.

[58] It was not until January 2014 that this error was picked up by the plaintiff. If the error in the accepted letter of offer was not rectified or amended by the L&S, it would mean that the plaintiff, being the registered title owner who had surrendered the title to the land, would be issued the subdivided title for the subject land as if it were a SESB sub-station. Such a status would not commensurate with the use of the subject land since it has a different ownership than that of SESB Reserve. Since the correct position is that the subject land is not intended to be owned and operated by SESB but is intended to be privately owned and operated, that restriction erroneously applied to the subject land has to be amended to the accepted letter of offer. Therefore, the plaintiff's letter dated 28 January 2014 (pp 367–368 CBD2) was written by the plaintiff under the hand of the second defendant to the L&S. Furthermore,

Daniel Tan (DW1) has testified on pp 143–144 to explain why the amendment of those restrictive conditions is necessary for the subdivision to be done properly.

[59] Throughout these correspondence, the approved Development Plan DP/008/05.99 is referred to in all the letters of offer and a minimised copy was attached to the accepted letter of offer (p 97 CBD1) forms the basis for the subdivision. The full-size plan is found on p 654 of CBD2. On it the denotation 'DP/008/05.99' is endorsed when the MPKK approved the subdivision/development on the plan. Furthermore, as this plan contained a reference to Development Plan No SHR/BLT/2806 dated December 1997, which is found on p 642 of CBD2, this must be referred to as well to verify that the subject land was privately owned and developed and the defendants submitted that the Development Plan No SHR/BLT/2806 established that the subject land was developed by PH with the consent of the landowner, the plaintiff.

[60] The other document for the subdivision of the land is MPKK's planning approval for the development and subdivision of the land, which is MPKK's letter dated 15 July 1999 to the plaintiff's architect found on pp 61–62, since the development approval terms and conditions have to be strictly complied with by the plaintiff for the development of the land and by PH for the subject land. In this planning approval, it is submitted for the defendants that there is no doubt that the subject land is a different development from the SESB sub-station, for its title expressly referred to the 'EXCISING OF SESB SUB-STATION AND CO-GEN STATION' in respect of the development plan DP/008/05.99. And condition 2.3 of the planning approval stipulates that 'This approval is given subject to the owner applying for conversion/subdivision of the land title to the Director of Lands and Surveys Department'.

[61] The L&S issued its letter dated 1 October 2014 to the plaintiff (p 486 CBD2) in which it amended the accepted offer and, inter alia, the annual rent was increased to RM31,800, and the land use was denoted as 'industrial (co gen plant)'. The plaintiff, under the new management and controlled by the majority shareholders, accepted the amended offer dated 1 October 2014. It follows that, the subject land, being now rightly in accordance with the approved development plan and the planning approval, stipulated as industrial (co-gen plant) meant that it is no longer an SESB reserve but rightly as a co-gen plant.

[62] Hence, there is no merit in the plaintiff's submission that the correspondence negates the common expectation, because the correspondence

referred to is between L&S and the plaintiff to resolve the problems encountered between the land authority and the landowner in the subdivision exercise.

[63] This also means, as pointed out by the defendants, that the plaintiff's submission that the plaintiff's letter written by the second defendant to L&S dated 24 January 2014 is one 'to change the use of the land from Tourist Complex to Industrial (Co Gen Plant)' is incorrect. The SESB sub-stations were never classified as tourist complex. The amendment was to classify it as a co-gen plant to be privately owned and not by SESB or the state government in compliance with the approved plan DP/008/05.99 and MPKK's planning approval dated 15 July 1999.

Enforceability of the SPA

[64] The plaintiff's had prayed, inter alia, for declarations that the SPA is void and that the second defendant had acted in breach of fiduciary duty in entering into the SPA without the due disclosure. The first defendant in this case already possessed the right to the subject land prior to and independent of the SPA. The defendants are not seeking specific performance of the SPA. I therefore agree with the defendants counsel's submission that the enforceability of the SPA is therefore not a live issue and there is therefore no reason to grant these relief. The issue in this suit is whether the first defendant, independent of the SPA, is entitled to occupy and own the subject land based on the equity raised under proprietary estoppel counterclaimed for in this suit. Where the issue is of no practical consequence, the court will not grant a declaratory judgment (see *Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (executor of the estate of Loo Cheng Ghee)* [1998] 4 MLJ 651; [1998] 4 CLJ 812).

CONCLUSION AND ORDERS

[65] The first and second defendant have succeeded on a balance of probabilities in establishing the existence of common expectation or assurance between PH and the plaintiff and the elements necessary to invoke the equitable principle of proprietary estoppel against the plaintiff.

[66] The plaintiff's claim is dismissed and the first and second defendants' counterclaim as per prayer (1), (2), (3), (4), and (5) in their counterclaim allowed with cost of RM50,000 to the first and second defendants. Cost is subject to allocatur.

Plaintiff's claim dismissed and defendants' counterclaim allowed with costs of RM50,000.

Reported by Nabilah Syahida Abdullah Salleh